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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GABRIEL CABRERA,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendant and Respondent.

B290537

(Los Angeles County
Super. Ct. No. BC642250)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Robert L. Hess, Judge. Affirmed.

Armstrong & Armstrong and James J. Armstrong for
Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Kathleen A. Kenealy,
Chief Assistant City Attorney, Scott Marcus, Chief, Civil
Litigation Branch, Blithe S. Bock, Assistant City Attorney, and
Matthew A. Scherb, Deputy City Attorney, for Defendant and
Respondent.

Gabriel Cabrera appeals the judgment entered after the trial court sustained without leave to amend the demurrer by the City of Los Angeles and former Los Angeles Chief of Police Charlie Beck (collectively City) to Cabrera's third amended complaint for wrongful discharge, fraud and related causes of action. Cabrera argues the court erred in finding he had failed to exhaust administrative remedies and to timely file a claim under the Government Claims Act (Gov. Code, § 810 et seq.);¹ all his causes of action were barred by the governing statutes of limitation; and, after four attempts to plead, his third amended complaint was "still so verbose and confused the Defendants cannot reasonably be required to respond." Gabriel contends in the alternative the court erred in denying him leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Cabrera's Tenure at the Los Angeles Police Department

Cabrera was hired by the Los Angeles Police Department (LAPD) on March 17, 1997. In October 1998, shortly after completing his training as a probationary police officer, Cabrera was seriously injured while on duty, infected with a form of bacterial meningitis by a suspect in his custody. Following a disability leave, Cabrera served on light desk duty until his employment with LAPD was terminated in 2012.

In early 2012, following a disciplinary investigation, Cabrera was charged with making false and misleading statements to LAPD supervisors during an official investigation, disobeying a court order and misusing another person's money.

¹ Statutory references are to this code unless otherwise stated.

On February 22, 2012 Chief Beck, after finding the charges substantiated, ordered Cabrera suspended without pay, proposed his removal from the force and sent the matter to a Board of Rights, where Cabrera could challenge the proposed discipline. The suspension was immediate; Cabrera's salary stopped 30 days later. The Board of Rights found Cabrera guilty of the charged misconduct and agreed Cabrera's removal was appropriate discipline. The removal order, served on November 19, 2012 and received by Cabrera on November 23, 2012, recited it was effective as of March 25, 2012, the date Cabrera had been relieved of duty without pay.

On November 19, 2015 Cabrera petitioned the chief of police for rehearing under section 1070(t) of the Los Angeles City Charter (Charter)² and for reduction of penalty under

² Section 1070(t) of the Charter provides, "Rehearing. At any time within three years after the effective date of removal, the removed member may file a request with the Chief of Police to be reheard or to be heard on the cause of the member's removal, together with a supporting affidavit setting forth in clear and concise language the reasons or grounds for a hearing or rehearing. The Chief shall consider and make a decision on the request and affidavit within 30 days after filing. If the Chief determines that good reason or cause exists for a hearing or rehearing, the Chief shall, without unnecessary delay, cause a Board of Rights to be constituted for the purpose of hearing and deciding upon the matter. The Board of Rights shall, at the conclusion of the hearing, render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, Board, or other tribunal, or any investigation or report of or discretion exercised by the Chief in such cases where no hearing was had before a Board of Rights) based only upon the evidence presented at the hearing. . . ."

section 1070(u) of the Charter.³ After receiving no response within the 30-day period specified in the Charter, on December 28, 2015 Cabrera served a notice of default on the City.

2. Cabrera's Claim Under the Government Claims Act

On May 19, 2016 Cabrera, through counsel, presented a claim for \$3 million in damages to the Los Angeles City Clerk pursuant to the Government Claims Act. In response to the question on the claim form asking how the damage or injury occurred, Cabrera explained, "The claimant filed a petition for rehearing of prior Board of Rights ('BOR') & penalty modification, pursuant to Los Angeles City Charter Sections 1070 (t) & (u), with & on the Los Angeles Police Department ('LAPD') & the Chief of Police ('COP'), on November 19, 2015 ('Petition'). LAPD & COP were compelled & required to respond, consider & decide Petition within thirty (30) days therefrom, to wit, December 19, 2015. LAPD & COP have failed to timely respond to Petition, pursuant to LA City Charter. On December 28, 2015 default notice was filed & served on LAPD & COP for failing to timely comply & respond to Petition, pursuant to the LA City Charter. Damages & injury occurred, beginning recently on December 28, 2015, but were ongoing and continuing since February 22, 2012."

³ Section 1070(u) of the Charter provides, "Modification of Penalty. Following the filing of the notice of penalty with the Board of Police Commissioners as required in subsection (p), the Chief of Police may correct a technical error, or where there is good cause shown, may reduce a penalty, including restoration of a person following removal. . . . [T]he member shall receive full compensation for any penalty or portion thereof already served which has been reduced or nullified by the Chief of Police. . . ."

Asked to describe the damage or injury claimed, Cabrera responded, “Loss of BOR rehearing & penalty modification. Loss of LAPD employment rights, reputation, interests, benefits. Resulting in personal, general, emotional, mental, monetary, reputational, property & exemplary damages.”

The Los Angeles City Attorney denied Cabrera’s claim on June 1, 2016. In the denial notice Cabrera was warned he had only six months from the date of the notice to file a lawsuit.

3. Cabrera’s Lawsuit Against the City

Cabrera filed an initial complaint against the City on November 30, 2016.⁴ That complaint was never served. On April 5, 2017 Cabrera filed a first amended complaint, which the City of Los Angeles and Chief Beck answered. Pursuant to stipulation and court order, Cabrera was permitted to file a second amended complaint and then, on December 27, 2017, a third amended complaint.

In the operative, 79-page third amended complaint Cabrera alleged members of the LAPD routinely engaged in fraudulent and corrupt practices and procedures in administering the LAPD’s discipline system, particularly at the Board of Rights adjudication phase. With respect to his own situation, Cabrera alleged his discharge from LAPD was based on “illegal and false facts, instructions, representations, and corruption, . . . all violating policy, contravening good morals, violating established

⁴ Cabrera asserts in his opening brief that the original complaint was filed November 13, not November 30, 2016. In support Cabrera cites to the page of the superior court’s case summary stating the complaint was filed, and the summons issued, on November 30, 2016. Cabrera did not designate the complaint for inclusion in the record on appeal.

interests of society, and breaching the terms and conditions of [Cabrera's] employment." Based on these allegations, Cabrera purported to allege causes of action for wrongful discharge, fraud/deceit/corruption, conspiracy to defraud/corrupt, breach/violation of public trust, violation of (unspecified) constitutional rights and obligations, violation of statutory rights (the Public Safety Officers Procedural Bill of Rights (POBRA) (§ 3300 et seq.)), declaratory relief and equitable/injunctive remedies.

4. *The City's Demurrer to the Third Amended Complaint*

The City demurred to the third amended complaint on January 26, 2018, arguing Cabrera's wrongful discharge, fraud and other causes of action accrued no later than November 23, 2012 when he received written notice his employment had been terminated. Because Cabrera had no more than one year to file a claim under the Government Claims Act (§ 911.2, subd. (a)),⁵ a prerequisite to any lawsuit against a public entity or public employee, but did not do so until May 19, 2016, the City contended all of Cabrera's causes of action were barred. In addition, the City asserted, because the original complaint was not filed until November 30, 2016, more than four years after the accrual of his various causes of action, each of them was barred by the applicable two-, three- or four-year statutes of limitations. Finally, the City argued Cabrera's complaint, other than the

⁵ Pursuant to section 911.2, subdivision (a), a claim relating to a cause of action for death or for injury to person or personal property must be presented not later than six months after the accrual of the cause of action; a claim relating to any other cause of action must be presented not later than one year after the accrual of the cause of action.

operative dates, was uncertain; if the demurrer was not sustained without leave to amend based on the untimely claim under the Government Claims Act or the bar of the statutes of limitation, the City urged the court to order Cabrera to amend his complaint to provide clear allegations to which it could fairly respond.

In his opposition to the demurrer Cabrera argued his causes of action did not accrue until December 2016 when he filed his notice of default after the City failed to respond to his requests to be reheard and for modification of penalty pursuant to Charter section 1070(t) and (u). As such, Cabrera contended, his claim was presented to the City within the six-month deadline of Government Code section 911.2, subdivision (a), and his lawsuit was filed within six months of the denial of that claim. Cabrera also argued he was entitled to the benefit of various legal doctrines, including tolling, delayed discovery, relation-back, and waiver and estoppel, based in part on the City's notice when denying his claim that he had six months to file his lawsuit, and in part on allegations that LAPD had initiated a new investigation of misconduct following receipt of his claim in May 2016. Cabrera also insisted each of the pleaded causes of action was "fact specific" and not at all uncertain.

After hearing argument of counsel the trial court sustained the demurrer without leave to amend. The court identified three bases for its ruling: (1) The pleading showed on its face that Cabrera had "failed to exhaust administrative remedies, by not seeking administrative mandate to review his termination and not timely filing his Government Claim." (2) The pleading showed on its face that each of the eight causes of action was time barred because the injury occurred not later than

November 19, 2012, and no limitations period longer than three years was applicable to any of Cabrera's claims.

(3) "[A]fter four attempts to plead, the [third amended complaint] is still so verbose and confused the Defendants cannot reasonably be required to respond."

A judgment of dismissal was signed and entered on April 9, 2018. Cabrera filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Mathews*, at p. 768; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848), but liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726;

see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

“Where the complaint is defective, “[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint.”” (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 970.) We determine whether the plaintiff has shown “in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) “[L]eave to amend should *not* be granted where . . . amendment would be futile.” (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Ivanoff v. Bank of America, N.A.*, *supra*, 9 Cal.App.5th at p. 726.)

2. *The Trial Court Properly Sustained the Demurrer to Cabrera’s Third Amended Complaint*

a. *The Government Claims Act*

“Suits for money or damages filed against a public entity are regulated by statutes contained in division 3.6 of the Government Code, commonly referred to as the Government Claims Act. . . . ‘[S]ection 905 requires the presentation of “all claims for money or damages against local public entities,” subject to exceptions not relevant here. Claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year. [Citation.] “[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected” [Citation.] “Thus, under these statutes, failure to timely present a claim for

money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity.”” (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 989-990; see *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208; *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1237.)

This claim presentation prerequisite must also be satisfied before a plaintiff may bring suit against a public employee for injury resulting from an act or omission in the scope of employment unless the plaintiff pleads or proves he or she did not know or have reason to know within the period for presentation that the injury was caused by a public employee. (§ 950.2; see *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 939 [“a claim against a public employee or former public employee for injuries resulting from acts or omissions in the course of his or her employment must be presented if a claim against the employing entity for the same injury must be presented”]; *Watson v. State of California* (1993) 21 Cal.App.4th 836, 843-844 [“[i]t is well settled that a government claim must be filed with the public entity before a tort action is brought against the public entity or public employee”]; see also *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 767 [“cause of action against public employee acting in course and scope of employment is barred if action against employing entity is barred”]; *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613 [“one who sues a public employee on the basis of acts or omissions in the scope of the defendant’s employment [must] have filed a claim against the *public-entity employer* pursuant to the procedure for claims against public entities”].)

“The purpose of these statutes is ‘to provide the public entity sufficient information to enable it to adequately

investigate claims and to settle them, if appropriate, without the expense of litigation.’ [Citation.] Consequently, a claim need not contain the detail and specificity required of a pleading, but need only ‘fairly describe what [the] entity is alleged to have done.’ [Citations.] As the purpose of the claim is to give the government entity notice sufficient for it to investigate and evaluate the claim, not to eliminate meritorious actions [citation], the claims statute ‘should not be applied to snare the unwary where its purpose has been satisfied.’” (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446 (*Stockett*).) ““If a plaintiff relies on more than one theory of recovery against the [governmental agency], each cause of action must have been reflected in a timely claim.”” (*Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 434.) Additionally, “the factual circumstances set forth in the claim must correspond with the facts alleged in the complaint.” (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776; accord, *Stockett*, at p. 447 “[i]f the claim is rejected and the plaintiff ultimately files a complaint against the public entity, the facts underlying each cause of action in the complaint must have been fairly reflected in a timely claim”].)

b. *Cabrera Failed To Timely File a Government Claim Alleging Wrongful Termination from LAPD*

Cabrera’s third amended complaint alleges in each of its causes of action, albeit in somewhat different ways, that his removal from LAPD in 2012 was effected through the City’s fraud, deceit and corruption and in violation of his constitutional (due process) and statutory (POBRA) rights. These causes of action accrued at the time Cabrera’s employment was terminated, November 19, 2012. (*Romano v. Rockwell Internat.*,

Inc. (1996) 14 Cal.4th 479, 483-484 [a cause of action for wrongful termination whether based on contract or tort or for violation of statute accrues at the time of termination of employment]; *id.* at p. 503 [“a cause of action for wrongful discharge in violation of public policy accrues at the time of termination of employment”]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1320 [same].)⁶

The date of accrual of a cause of action for purposes of the government claims statute is the same as the date of accrual that would apply to the statute of limitations governing a dispute between private litigants. (§ 901; *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 906; *Shirk v. Vista Unified School Dist.*, *supra*, 42 Cal.4th at pp. 208-209.) Accordingly, Cabrera’s government claim was due no later than six months after November 19, 2012. His May 19, 2016 claim was untimely (by three years); and, as the trial court ruled, his lawsuit is barred.

None of Cabrera’s attempts to plead around his untimely government claim has merit. First, Cabrera contends his claim was timely because it was filed within six months of the December 28, 2015 notice of default he filed when the City failed to respond to his request for rehearing pursuant to Charter section 1070(t). Cabrera is correct that his May 19, 2016 government claim focused on his section 1070(t) request,

⁶ The City suggests the accrual date may be March 25, 2012, the effective date of Cabrera’s removal from LAPD, rather than the November 19, 2012 date of the formal removal notice, citing section 1070(q) of the Charter, which provides, “A removal prescribed by the Board of Rights . . . shall relate back to and be effective as of the date of the relief from duty without pay pending hearing before and decision by the Board.” The difference is immaterial for our analysis.

identifying the City's failure to respond to that request, not the disciplinary investigation and 2012 Board of Rights order for his removal from LAPD, as the wrongful act for which he was seeking \$3 million in damages. But the fraud, deceit and corruption of which he complains in his lawsuit, and the damages he has allegedly sustained, concern the termination of his employment in 2012, not the denial of his request for a rehearing three years later.⁷ As to those theories of recovery, Cabrera's government claim was untimely and, in addition, did not fairly describe what the City had allegedly done to cause his injury—an additional basis for sustaining the City's demurrer. (See *Stockett, supra*, 34 Cal.4th at p. 446; *Fall River Joint Unified School Dist. v. Superior Court, supra*, 206 Cal.App.3d at p. 434.)

Second, Cabrera contends he did not learn of the corruption in LAPD's disciplinary system until late December 2016, thereby postponing the accrual of his causes of action under the delayed discovery rule. In his third amended complaint Cabrera alleges he only became aware of the City's fraud and deceit when he heard public statements regarding prior administrative hearings involving members of LAPD and learned of allegations of corruption that had been made in other officers' employment-related lawsuits. Yet Cabrera, who was represented by counsel at the Board of Rights proceedings, acknowledges that by November 2012 he knew the Board had relied on false and fabricated evidence at his hearing and had failed for unexplained reasons to consider what he believed was highly relevant expert

⁷ A Charter section 1070(t) request for rehearing is a post-termination remedy. Subdivision (t) expressly refers to a "removed member" and states the request must be made "within three years after the effective date of removal."

testimony regarding his 1998 injury and subsequent cognitive deficits. He also recognized at the time that the Board's decision "never seemed to make any legal sense." Accordingly, as he effectively admits, Cabrera suspected or, at the very least, should have suspected at that time that his termination had been caused by the City's wrongdoing. That is when the applicable statutes of limitations began to run. (See *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 [under the delayed discovery exception to the general rule of accrual of a cause of action, "the [limitations period] begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her"].) Cabrera's causes of action against the City based on his 2012 removal from LAPD accrued well before late 2016 for purposes of the government claims statute.

Third, Cabrera contends the time to file his government claim (and, presumably, the lawsuit alleging wrongful discharge and related causes of action) was tolled during the three-year period he had to file a request for rehearing under Charter section 1070(t). Cabrera cites no legal authority for this novel proposition. (See generally *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"].) Even if there were some merit to this argument, however, any period of tolling would necessarily apply only if a valid request for rehearing had been made. (Cf. Cal. Rules of Court, rule 8.108(e) ["a valid motion to reconsider an appealable order" extends the time to file an appeal from that order for the periods specified].) As discussed, Cabrera's removal was effective March 25, 2012. (Charter § 1070(q); see fn. 6,

above.) Accordingly, his section 1070(t) request was due no later than three years from that date—March 25, 2015. Cabrera’s request filed November 19, 2015, nearly eight months late, was not valid and did not toll the time requirements of Government Code section 911.2, subdivision (a).⁸

3. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

“If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.’ [Citation.] “The burden of proving such reasonable possibility is squarely on the plaintiff.” [Citation.] To satisfy this burden, “a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading’” by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action.” (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

⁸ This same analysis as to the date of accrual of Cabrera’s causes of action and the unavailability of the doctrines of delayed discovery and tolling also supports the trial court’s ruling that each of Cabrera’s causes of action in his third amended complaint was barred not only by the Government Claims Act but also by the governing statutes of limitation, none of which exceeds four years. (See Code Civ. Proc., §§ 335.1 [two-year limitations period for injury to an individual caused by the wrongful act of another], 338, subds. (a) [three-year limitations period for statutory violations], (d) [three-year limitations period for fraud], 343 [four-year limitations period for any cause of action not otherwise specified in the Code of Civil Procedure].)

Although Cabrera has requested leave to amend, he has failed to explain how, if given the opportunity, he could amend his complaint to cure his failure to timely present a claim under the Government Claims Act. Under these circumstances it was not an abuse of discretion for the trial court to deny leave to amend. (See *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081 [“plaintiff has the burden of proving that an amendment would cure the defect”].)

DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

DILLON, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.